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8 **United States District Court**
9 **Central District of California**
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11 FARSTONE TECHNOLOGY, INC.,

12 Plaintiff,

13 v.

14 APPLE INC.,

15 Defendant.

Case № 8:13-cv-1537-ODW(JEMx)

CLAIM-CONSTRUCTION ORDER

[41]

16 **I. INTRODUCTION**

17 This patent case involves computer backup and recovery technology. Plaintiff
18 Farstone Technology, Inc. (“Farstone”) asserts U.S. Patent No. 7,120,835 (“the ’835
19 Patent”), entitled “Computer Equipment Having a Prompt Access Function and
20 Related Method,” against Defendant Apple Inc. (“Apple”). The construction of nine
21 terms is in dispute. Apple argues that eight out of the nine disputed terms are
22 indefinite under 35 U.S.C. § 112.¹

23 **II. FACTUAL BACKGROUND**

24 Farstone is the owner of the ’835 Patent. (Compl. ¶ 8.) Farstone alleges that
25 Apple’s Time Machine features in Apple Mac computers and MAC OS X operating
26 systems infringe claims 1–7 and 9–13 of the ’835 Patent. (*Id.* ¶ 10.) The asserted
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28 ¹ Because the patent in suit predates the effective date of the America Invents Act (AIA), all statutory citations herein are pre-AIA.

claims are directed to technology that creates a backup of the data stored in or relating to a hardware resource, such as a hard disk, and enables a user to later restore that data. The alleged advantages of the patented invention over conventional backup/recovery software at the time are the ability to support unlimited recovery points and prompt access and economical use of system resources. Accordingly, representative claim 1 recites:

A computer equipment having a prompt access function, said computer equipment comprising:

a processing system having at least one hardware resource with a backup/recovery module, said backup/recovery module creating at least one recovery unit to hold backup data; and

a displaying system for displaying backed up data of said processing system, said backed up data of said processing system corresponding to each of said at least one recovery unit, said displaying system having a selecting means, said selecting means selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit, said displaying system displaying said selected status;

wherein said at least one recovery unit respectively reflects a corresponding status of said at least one hardware resource at the time of creation of each of said at least one recovery unit, said at least one hardware resource can be restored to status at the time of creation of each of said at least one recovery unit.

'835 Patent at 8:62–9:14. A schematic block diagram of a preferred embodiment of a computer equipment is presented below:

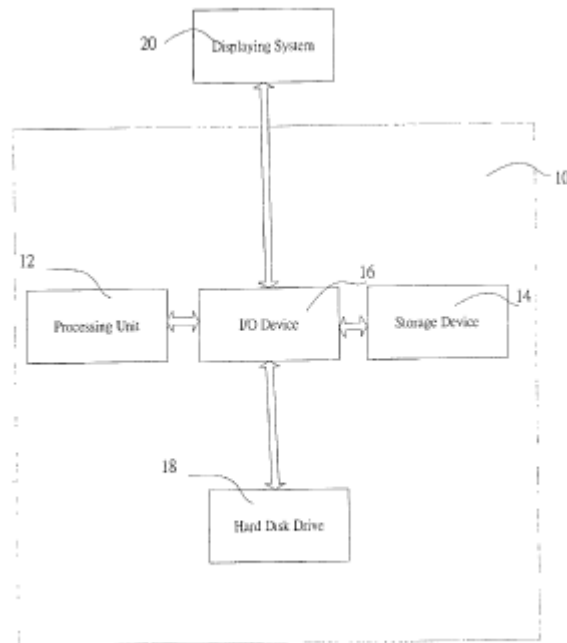
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'835 Patent at Fig. 1. The computer equipment has displaying system 20 and processing system 10.

On November 3, 2014, the parties filed their final joint claim chart. (ECF No. 44.) The parties dispute the construction of nine terms:² (1) "recovery unit;" (2) "selecting means, said selecting means selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit;" (3) "selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit;" (4) "said displaying system displaying said selected status;" (5)(a) "said at least one recovery unit respectively reflects a corresponding status of said at least one hardware resource at the time of creation of each of said at least one recovery unit" and (b) "said at least one recovery unit respectively reflects a corresponding status of at least one hardware resource of said

² Apple previously proposed that the phrase "a backup/recovery module, said backup/recovery module creating at least one recovery unit to hold backup data" in claim 1 be construed. In Apple's Responsive Claim Construction Brief (ECF No. 47) Apple agreed that no construction is necessary for this term. (ECF No. 47, at n.3.)

1 processing system at the time of creation of each of said at least on recovery unit;” (6)
 2 “a status of said computer equipment at the time creating said corresponded recovery
 3 unit;” (7) “a processing system . . . , said processing system creating at least one
 4 recovery unit;” (8) “loading said selected recovery unit into said processing system;”
 5 (9) “displaying a status corresponding to said processing system which corresponds to
 6 said selected recovery unit.”

7 Farstone filed its Opening Claim Construction Brief on November 3, 2014.
 8 (ECF No. 43.) Apple responded and Farstone replied. (ECF Nos. 47, 48.) On
 9 December 10, 2014, the Court held a claim-construction hearing, which included
 10 testimony from the parties’ expert witnesses. The Court construes the disputed terms
 11 below.

12 III. LEGAL STANDARD

13 The purpose of claim construction is to determine the meaning and scope of the
 14 patent claims alleged to be infringed. *O2 Micro Int’l Ltd. v. Beyond Innovation Tech.*
 15 *Co., Ltd.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). Claim construction is a question of
 16 law to be decided by the court. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967,
 17 979 (Fed. Cir. 1995). In determining the proper construction of a claim, the Court
 18 reviews both intrinsic and extrinsic evidence, placing emphasis on the former.

19 A. Intrinsic Evidence

20 The court begins with intrinsic evidence of claim meaning—which consists of
 21 the claim language, patent specification, and, if in evidence, prosecution history.
 22 *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005); *Vitronics Corp. v.*
 23 *Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

24 The Court must always begin with an examination of the claim language itself.
 25 *August Tech. Corp. v. Camtek, Ltd.*, 655 F.3d 1278, 1284 (Fed. Cir. 2011); *see also*
 26 *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998)
 27 (“The claims define the scope of the right to exclude; the claim construction inquiry,
 28 therefore, begins and ends in all cases with the actual words of the claim.”). Claim

1 language is paramount; the other intrinsic and extrinsic evidence—while valuable—
2 cannot be utilized to rewrite the claim language. *SuperGuide Corp. v. DirecTV*
3 *Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004).

4 The terms used in the claims are generally given their “ordinary and customary
5 meaning.” *Phillips*, 415 F.3d at 1312. This “ordinary and customary meaning” is the
6 meaning as understood by a person of ordinary skill in the art (“POSITA”) in question
7 at the time of the invention. *Id.* The POSITA “is deemed to read the claim term not
8 only in the context of the particular claim in which the disputed term appears, but in
9 the context of the entire patent, including the specification.” *Id.*

10 A patentee is presumed to have intended the ordinary meaning of a claim term
11 unless the patentee “(1) . . . sets out a definition and acts as his own lexicographer, or
12 (2) disavows the full scope of a claim term either in the specification or during
13 prosecution.” *Thorner v. Sony Comp. Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed.
14 Cir. 2012).

15 The specification is “always highly relevant to the claim construction analysis.”
16 *Markman*, 52 F.3d at 978. “[T]he specification may reveal a special definition given
17 to a claim term by the patentee that differs from the meaning it would otherwise
18 possess. In such cases, the inventor’s lexicography governs.” *Phillips*, 415 F.3d at
19 1316. But the court must be wary of “improperly importing a limitation from the
20 specification into the claims.” *Retractable Techs., Inc. v. Becton*, 653 F.3d 1296,
21 1305 (Fed. Cir. 2011).

22 The Court may also consider the patent’s prosecution history. The prosecution
23 history “encompasses the complete record of the proceedings before the PTO,
24 including the prior art cited during the examination of the patent.” *Id.* The
25 prosecution history provides evidence about how the United States Patent and
26 Trademark Office (“USPTO”) and the inventor understood the invention. *Id.* But
27 “because the prosecution history represents an ongoing negotiation between the PTO
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1 and the applicant, rather than the final product of that negotiation, it often lacks the
2 clarity of the specification and thus is less useful for claim construction purposes.” *Id.*

3 **B. Extrinsic Evidence**

4 Courts may also rely on extrinsic evidence to better understand the underlying
5 technology and to determine what a POSITA would understand the claim terms to
6 mean. *Phillips*, 415 F.3d at 1318. Extrinsic evidence “consists of all evidence
7 external to the patent and prosecution history, including expert testimony, dictionaries,
8 and learned treatises.” *Id.* at 1317. But while extrinsic evidence can be useful, it is
9 “unlikely to result in a reliable interpretation of patent claim scope unless considered
10 in the context of the intrinsic evidence.” *Id.* at 1319. Thus, it is less significant than
11 intrinsic evidence. *Id.*

12 **IV. DISCUSSION**

13 **A. Apple’s Challenge to the Admissibility of Farstone’s Expert Witness**

14 As an initial matter, the Court is unconvinced by Apple’s argument that
15 Farstone’s expert, Dr. Kaliski, is not qualified to opine as one of ordinary skill in the
16 art with respect to the ’835 Patent. (*See* ECF No. 47, at 5.) Apple’s proposed
17 requirement for a person of ordinary skill in the art is someone with an undergraduate
18 degree in computer science or equivalent and one year of experience in the design and
19 implementation of backup/recovery systems. (*Id.*)

20 “[W]here an issue calls for consideration of evidence from the perspective of
21 one of ordinary skill in the art, it is contradictory to Rule 702 to allow a witness to
22 testify on the issue who is not qualified as a technical expert in that art.” *Sundance,*
23 *Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008). Federal Rule
24 of Evidence 702 provides that:

25
26 [i]f scientific, technical, or other specialized knowledge will assist the
27 trier of fact to understand the evidence or to determine a fact in issue, a
28 witness qualified as an expert by knowledge, skill, experience, training,
or education may testify thereto in the form of an opinion or otherwise, if

1 (1) the testimony is based upon sufficient facts or data, (2) the testimony
2 is the product of reliable principles and methods, and (3) the witness has
3 applied the principles and methods reliably to the facts.

4 Under Fed. R. Evi. 702 the Court finds Dr. Kaliski has the qualifications to
5 opine on the issues before this Court from the perspective of one with ordinary skill in
6 the art. *See Acoustical Design, Inc. v. Control Elecs. Co.*, 932 F.2d 939, 942 (Fed.
7 Cir. 1991) (“Admission of expert testimony is within the discretion of the trial court.”)
8 (citations omitted). The law does not require an expert opining from the perspective
9 of one of ordinary skill in the art to have the same qualifications as the inventor or
10 even be an inventor himself. *Neutrino Dev. Corp. v. Sonosite, Inc.*, 410 F. Supp. 2d
11 529, 536 (S.D. Tex. 2006). However, the law does require that the expert be
12 sufficiently qualified to construe the patent and understand the claimed invention as
13 one with ordinary skill in the art of the relevant field. *Id.* “Expert witnesses quite
14 often have extraordinary skill in the art and are perfectly capable of evaluating the
15 level of ordinary skill and applying that perspective. The witness himself need not be
16 the hypothetical ordinary artisan.” *Id.* at 550.

17 Dr. Kaliski has a Ph.D in Electrical Engineering from the Massachusetts
18 Institute of Technology and has been teaching in the field of Electrical Engineering,
19 Computer Engineering, and Computer Science for over 35 years. (*See* ECF No. 49,
20 Ex. F-12, Kaliski Decl., Ex. 1.) Dr. Kaliski’s advanced degrees, decades of teaching,
21 and variety of software and hardware design experience more than compensates any
22 purported lack of experience in design and implementation of backup/recovery
23 systems. (*See* Claim Construction Hr’g Tr. 15:1–3, Dec. 10, 2014 (“[The Court]
24 find[s] that you are absolutely an expert in the field of backup/recovery software.”).)
25 For example, Dr. Kaliski has been on projects which include software and hardware
26 design reconstruction, algorithm development for CAD/CAM systems, software
27 engineering for advanced signal processing applications, and development of expert
28 systems for verification of design standards for PC board designs and for component

1 testability. (*See* Kaliski Decl. Ex. 1.)

2 Apple's expert, Mr. Cummings's experiences do not go far astray from Dr.
3 Kaliski's background. Mr. Cummings's experiences include design, implementation,
4 and troubleshooting of backup/recovery software; design and implementation of
5 various computer systems for aircraft testing, database machines, and weather
6 processing; designing fault-tolerate operating systems for spacecraft; and development
7 of software for wireless products supporting IP and ATM protocols. (*See* Cummings
8 Decl., Ex. 3.)

9 These similar experiences show that both Dr. Kaliski and Mr. Cummings have
10 extraordinary skill in the art and are indeed qualified to opine on the '835 Patent. To
11 the extent the parties dispute the particular levels of a person of ordinary skill in the
12 art,³ the Court need not decide this factual issue in its *Markman* decision. *See*
13 *Neutrino*, 410 F. Supp. 2d at 536 ("Any disagreement between the parties about what
14 constitutes the level of ordinary skill would present a fact issue to be resolved by the
15 jury."). Suffice it to say that under either definition of a person of ordinary skill in the
16 art, the two experts are qualified to opine on issues of claim construction related to the
17 '835 Patent. With this matter settled, the Court turns to construing the parties'
18 disputed terms.

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25 ³ Farstone argues that a person of ordinary skill in the art of the '835 patent is a person with a
26 bachelor's degree in computer science, computer engineering, electrical engineering or the
27 equivalent, and 3-5 years of experience in the field of computer operating systems and data recovery,
28 or a post-graduate degree in computer science, computer engineering, electrical engineering, or the
equivalent, and 1-2 years of experience in the field of computer operating systems and data recovery,
or equivalent experience. (Kaliski Decl. ¶ 17.)

B. Claim Construction

CLAIM TERM	FARSTONE'S CONSTRUCTION	APPLE'S CONSTRUCTION
1. "recovery unit"	No construction necessary OR If construed: A collection of file backup data and configuration information reflecting a state of a computer hardware resource at a point in time.	Indefinite

This language appears in claims 1, 2, 3, 9, 10, and 11. Apple argues that "recovery unit" is indefinite because neither the claim language nor the specification enables a person of skill in the art to discern the scope of the claim with "reasonable certainty." (ECF No. 47, at 6.) Specifically, Apple argues that the claim language and specification states that a "recovery unit" is created to "hold backup data" and "reflects a corresponding status of said at least one hardware resource" but says nothing about the structure of the "unit." (*Id.*)

Farstone argues that no construction is necessary, but if construed, proposes that recovery unit is "a collection of file backup data and configuration information reflecting a state of a computer hardware resource at a point in time."

Under 35 U.S.C. § 112, ¶ 2, a patent must "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." A patent claim is invalid for indefiniteness if its language, when read in light of the specification and the prosecution history, "fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. —, 134 S.Ct. 2120, 2124 (2014). Patents are presumed to be valid and the burden of establishing invalidity rests on the challenger. 35 U.S.C. § 282; *id.* at 2130 n. 10.

Apple fails to show that "recovery unit" is indefinite. Apple's main contention is that Farstone "runs afoul" of the prohibition against open-ended claiming that tries

1 to cover any and all structures for performing a function. (ECF No. 47, at 7.) But, the
 2 Supreme Court’s recent decision in *Nautilus* did not hold that a claim term must be
 3 absolutely certain to avoid indefiniteness. 134 S. Ct. at 2129 (“The definiteness
 4 requirement, so understood, mandates clarity, while recognizing that absolute
 5 precision is unattainable. The standard we adopt accords with opinions of this Court
 6 stating that the certainty which the law requires in patents is not greater than is
 7 reasonable, having regard to their subject-matter.”) (internal quotations omitted).

8 Apple’s argument bears more on breadth than indefiniteness. To the extent that
 9 Apple is arguing the scope is too broad, that goes to novelty, not indefiniteness.⁴ The
 10 intrinsic record is reasonably definite in indicating what the recovery unit consists of
 11 in the context of a computer equipment. The recovery unit is created by the
 12 processing system of a computer equipment to hold backup data in a storage device.
 13 *See, e.g.*, ’835 Patent at 4:34–37; 7:6–9. The type of data stored within the recovery
 14 unit includes hardware resource configuration and data in the processing system at the
 15 time the recovery unit is created. *Id.* at 4:46–49; 6:9–15. Thus, the data in the
 16 recovery unit allows the user to recover a computer equipment back to a previous
 17 state. *Id.* at 2:5–13. Therefore, in light of the specification, a person having ordinary
 18 skill in the art would be able to ascertain the meaning of recovery unit with reasonable
 19 certainty. (Kaliski Decl. ¶ 30.)

20 Finding that “recovery unit” is not indefinite, the Court adopts Farstone’s
 21 construction of “a collection of file backup data and configuration information
 22 reflecting a state of a computer hardware resource at a point in time.” (ECF No. 43, at
 23 11.) This construction is supported by the claim language and specification. (*See*
 24 Kaliski Decl. ¶ 30.) Beginning with the claim language, claim 1 recites, “at least one
 25 recovery unit to hold backup data . . . said at least one recovery unit respectively
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27 ⁴ Apple’s arguments regarding insufficient structure for recovery unit are unavailing because
 28 “insufficient structure” is not the correct standard when determining indefiniteness. Structure is only
 relevant when analyzing means-plus-function claim language under 35 U.S.C. § 112, ¶ 6, which
 Apple does not argue and the Court does not find applicable for this term.

reflects a corresponding status of said at least one hardware resource at the time of creation of each of said at least one recovery unit.” ’835 Patent at 8:66–67, 9:9–12. Claim 3 also requires the “at least one recovery unit” to include “configuration corresponding to said at least one hardware resource and said backup data” *Id.* at 9:21–23.

The specification is also instructive. Specifically, the specification repeatedly explains that each recovery unit contains both backup data and configuration information corresponding to a hardware resource. *See e.g., id.* at 2:42–48, 3:7–11, 4:44–49, 6:10–15 (“The status corresponding to the processing system is a status of the computer equipment at the time creating the corresponded recovery unit. The data contained in the processing system corresponding to the recovery unit includes configuration corresponding to the hardware resources and the backup data held in the recovery unit respectively.”) Thus, the specification, like the claim language, depicts the “recovery unit” as “a collection of file backup data and configuration information reflecting a state of a computer hardware resource at a point in time.”

CLAIM TERM	FARSTONE’S CONSTRUCTION	APPLE’S CONSTRUCTION
2. “selecting means, said selecting means selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit”	No construction necessary OR Recited Function: Selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit. Corresponding Structure: A user interface and input devices.	Recited Function: Selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit. Corresponding Structure: No corresponding structure disclosed.

This phrase appears in claim 1. Farstone argues that this term is readily understood and requires no construction. (ECF No. 43, at 13.) Farstone contends that

1 this term should not be construed as a means-plus-function limitation under 35 U.S.C.
 2 § 112, ¶ 6 despite the fact that the term includes the word “means.” (*Id.* at 14.)

3 Under 35 U.S.C. § 112, ¶ 6 a patentee has the option to express a claim
 4 limitation as “a means or step for performing a specified function without the recital
 5 of structure, material, or acts in support thereof,” and a claim limitation expressed in
 6 this manner “shall be construed to cover the corresponding structure, material, or acts
 7 described in the specification and equivalents thereof.” *Inventio AG v. ThyssenKrupp*
 8 *Elevator Americas Corp.*, 649 F.3d 1350, 1355–56 (Fed. Cir. 2011). The use of the
 9 word “means” presumptively invokes 35 U.S.C. § 112, ¶ 6. *TriMed, Inc. v. Stryker*
 10 *Corp.*, 514 F.3d 1256, 1259 (Fed. Cir. 2008). The presumption is rebutted “if the
 11 claim itself recites sufficient structure to perform the claimed function.” *Envirco*
 12 *Corp. v. Clestra Cleanroom, Inc.*, 209 F.3d 1360, 1364 (Fed. Cir. 2000); *see also Sage*
 13 *Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1427–28 (Fed. Cir. 1997) (“[W]here
 14 a claim recites a function, but then goes on to elaborate sufficient structure, material,
 15 or acts within the claim itself to perform entirely the recited function, the claim is not
 16 in means-plus-function format.”). Sufficient structure exists when the claim language
 17 specifies the exact structure that performs the functions in question without need to
 18 resort to other portions of the specification or extrinsic evidence for an adequate
 19 understanding of the structure. *See Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363,
 20 1376 (Fed. Cir. 2003).

21 Apple argues that Farstone has failed to overcome the presumption of invoking
 22 § 112, ¶ 6 because it has not shown that the claim language contains sufficiently
 23 definite structure to perform the recited function. (ECF No. 47, at 9.) The Court
 24 agrees. Farstone argues that a person of ordinary skill in the art would understand that
 25 “selecting means” refers to a user interface and input devices, such as a keyboard and
 26 mouse. (ECF No. 43 at 14.) Unfortunately, the structure that Farstone recites does
 27 not come from the claim language but from the specification. *See* ’835 Patent at 5:32–
 28 36. Further, claim 4 suggests that “selecting means” and “user-operating interface”

1 are distinct portions of the displaying system and therefore the structure of a user
2 interface and input device is not applicable to selecting means. *See* '835 Patent at
3 9:25–26 (“The computer equipment according to claim 1, wherein said displaying
4 system has a user-operating interface.”). Finally, “displaying system” does not
5 provide sufficient structure to rebut the means-plus-function presumption because it is
6 not linked in the claim as the “means” for selecting a status. Rather, the displaying
7 system is recited as *including* those means. *Id.* at 9:4–7 (“[S]aid displaying system
8 *having* a selecting means . . .”) (emphasis added). Therefore, Farstone has failed to
9 rebut the presumption.

10 Having concluded that selecting means recited in claim 1 is drafted in means-
11 plus-function format, the Court turns to the means-plus-function analysis. The overall
12 means-plus-function analysis is a two-step process. First, the Court must identify the
13 claimed function. *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324,
14 1332 (Fed. Cir. 2006). Second, the Court must identify the corresponding structure in
15 the specification that performs the recited function. *Id.* The parties do not dispute the
16 recited function of the term; therefore the Court will address the second step of the §
17 112, ¶ 6 analysis regarding corresponding structure.

18 It is well-established that the “specification must be read as a whole to
19 determine the structure capable of performing the claimed function.” *Budde v.*
20 *Harley-Davidson, Inc.*, 250 F.3d 1369, 1379 (Fed. Cir. 2001). A “structure disclosed
21 in the specification is corresponding structure only if the specification or prosecution
22 history clearly links or associates that structure to the function recited in the claim.”
23 *Med. Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1210 (Fed.
24 Cir. 2003) (citation omitted). “The duty of a patentee to clearly link or associate
25 structure with the claimed function is the quid pro quo for allowing the patentee to
26 express the claim in terms of function under section 112, paragraph 6.” *Id.* at 1211
27 (citations omitted). Thus, “[i]f an applicant fails to set forth an adequate disclosure,
28 the applicant has in effect failed to particularly point out and distinctly claim the

1 invention....” *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946, 948 (Fed. Cir.
2 2007) (citation omitted). Whether the specification “adequately sets forth structure
3 corresponding to the claimed function necessitates consideration of that disclosure
4 from the viewpoint of one skilled in the art.” *Budde*, 250 F.3d at 1376.

5 In the alternative, Farstone argues that the corresponding structure for selecting
6 means is a user interface and input device. (ECF No. 43, at 15.) Apple argues that
7 there is no corresponding structure disclosed in the specification and therefore the
8 “selecting means” phrase is indefinite. (ECF No. 47, at 9.)

9 The Court rejects both proposals and finds that the invention of the ’835 Patent
10 is performed on a general purpose computer and therefore the structure associated
11 with “selecting” for a general purpose computer is applicable. (*See* Hr’g Tr. 52:24–
12 53:3.) The Federal Circuit has held that “[i]n a means-plus-function claim in which
13 the disclosed structure is a computer, or microprocessor, programmed to carry out an
14 algorithm, the disclosed structure is not the general purpose computer, but rather the
15 special purpose computer programmed to perform the disclosed algorithm.” *WMS*
16 *Gaming, Inc. v. Int’l Game Tech.*, 184 F.3d 1339, 1349 (Fed. Cir. 1999) (citing *In re*
17 *Alappat*, 33 F.3d 1526, 1545 (Fed. Cir. 1994.)). The Federal Circuit explained that
18 “[t]he instructions of the software program that carry out the algorithm electrically
19 change the general purpose computer by creating electrical paths within the device.”
20 *Id.* at 1348. Thus, “[t]hese electrical paths create a special purpose machine for
21 carrying out the particular algorithm.” *Id.*

22 Nonetheless, the Federal Circuit has also warned that this rule does not
23 automatically apply to any function that is linked to a general purpose computer. *In re*
24 *Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011).
25 Rather, the rule applies when specific functions would need to be implemented by
26 programming a general purpose computer to convert it into a special purpose
27 computer capable of performing those specified functions. *Id.* That is, if a general
28

purpose computer is sufficient for performing the function, then no algorithm is required as the corresponding structure. *Apple*, 757 F.3d at 1298.

“Selecting” is a common computer function and therefore requires no additional structure to be disclosed. (See Kaliski Decl. at ¶¶ 32, 34-35.) See also *Horus Vision, LLC v. Applied Ballistics, LLC*, No. 13-CV-05460-BLF, 2014 WL 6989233, at *4 (N.D. Cal. Dec. 9, 2014) (“Because patents enjoy the presumption of validity, where disputes arise as to the sufficiency of the specification’s disclosure of a structure corresponding to a particular means-plus-function claim limitation, the defendant bears the burden of proving that an ordinary artisan would not understand the disclosure.”) (quotations and citations omitted). The Federal Circuit has previously found that for simple functions like “processing,” “receiving,” and “storing,” the specification did not need to disclose an algorithm. *In re Katz*, 639 F.3d at 1315–16. Since a general purpose computer could perform those functions without any programming, the Federal Circuit concluded that no algorithm was necessary. *Id.* “Selecting means” of claim 1 falls within that same category. The recited function is simply selecting or choosing a recovery unit on a displaying system. Since these functions do not need to be implemented by a special purpose computer, an algorithm is unnecessary. See *In re Katz Interactive Call Processing Patent Litig.*, 821 F. Supp. 2d 1135, 1153 (C.D. Cal. 2011). Therefore, “selecting means” is not indefinite for lack of corresponding structure.

CLAIM TERM	FARSTONE’S CONSTRUCTION	APPLE’S CONSTRUCTION
3. “ selecting a status corresponding to said processing system at the time of creation of each of said at least one recovery unit ”	No construction necessary Or If construed: Selecting a recovery unit	Indefinite

This phrase appears in claim 1. The point of contention in this claim term is the construction of the term “status.” Apple argues that the specification does not provide

1 a clear construction for the term “status.” (ECF No. 47, at 12.) Farstone equates
 2 “status” with “recovery unit.” (ECF No. 43, at 16.) The Court disagrees with Apple’s
 3 argument that no construction is supported in the specification, but does not entirely
 4 agree with the construction offered by Farstone. The Court construes “status” as “data
 5 in the processing system at that time, including file backup data and hardware
 6 configuration.” The distinction between “status” and “recovery unit” is time. That is
 7 the “status” of a computer now, will be a “recovery unit” in the future. This
 8 construction is supported by the language in claim 1: “[A] status corresponding to said
 9 processing system *at the time of creation* of each of said at least one recovery unit . . .
 10 at least one recovery unit respectively reflects a corresponding status of said at least
 11 one hardware resource *at the time of creation* of each of said at least one recovery unit
 12” ’835 Patent at 9:5–12 (emphasis added). In most of the claims “status” is
 13 followed by “at the time of creation” or preceded by the term “previous,” both
 14 indicating that “status” corresponds to time. *See e.g. id.* at 9:38–39, 50–58. The
 15 Court’s reading of the claim language is consistent with the specification:

16 The *status* corresponding to the processing system is a *status of said*
 17 *computer equipment at the time creating said corresponded recovery*
 18 *unit*. The data contained in the processing system corresponding to the
 19 recovery unit includes configuration corresponding to the hardware
 20 resource and the backup data held in the recovery unit respectively.

21 ’835 Patent at 4:44–49. That is, a “previous status” is equivalent to a “recovery unit.”
 22 *See id.* at 4:6–11 (“The present invention describes a new computer equipment with a
 23 virtually recovery utility, which can accomplish file access to the contents of the
 24 recovery point to make sure of the previous status to be restored after rebooting the
 25 computer system.”)

26 Apple contends that the term “status” is indefinite because it “could be any of a
 27 vast number of things.” (ECF No. 47, at 12.) The term “status” is not construed in a
 28 vacuum but within the context of the specification. *See Apple Computer, Inc. v.*

1 *Articulate Sys., Inc.*, 234 F.3d 14, 25 (Fed. Cir. 2000) (“[T]he claim must be
 2 interpreted in light of the teachings of the written description and purpose of the
 3 invention described therein.”) As articulated by Farstone, the object of the
 4 backup/recovery system in the ’835 Patent is to enable the user to return a hardware
 5 resource in the processing system to a state that is operational which includes
 6 hardware configuration information and backup file data of interest to the user.
 7 (Kaliski Decl. ¶ 39.) *See, e.g.* ’835 Patent at 1:54–58, 2:25–29, 5:54–59, 8:28–30.
 8 One of ordinary skill in the art would understand “status” to be the data associated
 9 with the operational state. (Kaliski Decl. ¶ 38.)

10 Furthermore, the Court does not object to Farstone’s use of “state or condition”
 11 as a substitute for “status” in its proposed constructions. (*See* ECF No. 43, at 13.)
 12 While the Court does not agree that “state or condition” provides more clarity, to the
 13 extent that the terms encompass the construction of status as articulated above, the
 14 Court finds “state or condition” consistent with “status.” Therefore, the Court
 15 construes “status” as “data in the processing system at that time, including file backup
 16 data and hardware configuration.”

CLAIM TERM	FARSTONE’S CONSTRUCTION	APPLE’S CONSTRUCTION
4. “said displaying system displaying said selected status”	No construction necessary Or If construed: The displaying system displays the state or condition of the processing system reflected in the selected recovery unit.	Indefinite

24 This phrase appears in claim 1. Apple argues that this term is indefinite
 25 because a person of ordinary skill in the art cannot determine with reasonable
 26 certainty what it means. (ECF No. 47, at 15.) Part of Apple’s argument relates to the
 27 construction of “status” which was addressed above. Because a construction for
 28

1 “status” is supported by the claim language and specification, “said selected status” is
2 not indefinite.

3 Apple also argues that Farstone’s construction is “difficult to follow.” Apple
4 has failed to explain how “difficult to follow” is a criteria when considering the issue
5 of indefiniteness. The Court is unconvinced that the specification and claim language
6 do not support a construction with reasonable certainty for this term. The Court
7 agrees with Farstone that the ’835 Patent uses the ordinary and customary meaning of
8 the term “displaying.” That is “displaying” means visible to the user. (ECF No. 43,
9 at 17; *see also* Kaliski Decl. ¶¶ 40–42.)

10 The language in claim 1 supports this construction of “displaying.” Claim 1
11 describes a “displaying system” which also includes a selecting means to select a
12 previous status or recovery unit. ’835 Patent at 9:1–8. The displaying system
13 displays the selected status. *Id.* Thus, a user can only select a status if it is visible by
14 a displaying system.

15 Further, the specification describes that users can open and view files in the
16 selected recovery unit, so they can determine the outcome of a recovery operation
17 beforehand. ’835 Patent at 5:59–62, 4:26–30. (Kaliski Decl. ¶ 41.) The specification
18 also describes displaying a selected status displaying a recovery point in file folder
19 format and displaying contents of files in the recovery point opened by the user. *See*
20 *id.* at 6:29–30, 38–39, 8:28–30.

21 Therefore, because “status” is not indefinite (as explained above) and
22 “displaying” is afforded its plain and ordinary meaning, “said displaying system
23 displaying said selected status” is not indefinite.

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CLAIM TERM	FARSTONE'S CONSTRUCTION	APPLE'S CONSTRUCTION
5. "said at least one recovery unit respectively reflects a corresponding status of said at least one hardware resource [of said processing system] at the time of creation of each of said at least one recovery unit"	No construction necessary Or If construed: The recovery units reflect a state or condition of at least one hardware resource at the time the recovery unit is created.	Indefinite

This phrase appears in claims 1 and 9. The basis of Apple's contention is that the term "status" is indefinite. Having found otherwise above, the Court finds no other construction is necessary for this term.

CLAIM TERM	FARSTONE'S CONSTRUCTION	APPLE'S CONSTRUCTION
6. "a status of said computer equipment at the time creating said corresponded recovery unit"	No construction necessary. Or If construed: State or condition of the computer equipment at the time a corresponding recovery unit is created.	Indefinite

This language appears in claims 2 and 10. The basis of Apple's contention is that the term "status" is indefinite. Having found otherwise above, the Court finds no other construction is necessary for this term.

Apple also argues that this term renders claim 2 indefinite because "status of said computer equipment" in claim 2 is broader than a "status corresponding to said processing system" in claim 1, from which claim 2 depends. 35 U.S.C. § 112, ¶ 4 states: "[A] claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed. A claim in dependent form shall be construed to incorporate by reference all the limitations of the

claim to which it refers.” 35 U.S.C § 112, ¶ 4. “Under the principles of claim differentiation, the independent claims are presumed to be broader.” *Hill Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1376 (Fed. Cir. 2014).

In this case Apple has failed to rebut this presumption because dependent claim 2 can be read as narrower than claim 1. *See Tranxition, Inc. v. Lenovo (U.S.) Inc.*, No. 3:12-CV-01065-HZ, 2014 WL 6809749, at *3 (D. Or. Dec. 2, 2014) (“[C]laims should be so construed, if possible, as to sustain their validity.”) (citing *ACS Hosp. Sys., Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1577 (Fed. Cir. 1984)). The computer system in the ’835 Patent comprises a processing system and displaying system. *See, e.g.*, ’835 Patent at 8:62–9:2. Therefore, the status of said computer equipment in claim 2 encompasses the status of both the processing system and the displaying system, which is narrower than the just the status of the processing system in claim 1. Thus, Apple’s argument fails.

CLAIM TERM	FARSTONE’S CONSTRUCTION	APPLE’S CONSTRUCTION
7. “a processing system . . ., said processing system creating at least one recovery unit”	No construction necessary OR If 35 U.S.C. § 112, ¶ 6 applies: Recited Function: Creating at least one recovery unit Corresponding Structure: A processing system including a backup/recovery module	Should be construed as 35 U.S.C. § 112, ¶ 6 limitation Recited Function: Creating at least one recovery unit Corresponding Structure: None disclosed.

This phrase appears in claim 9. Apple argues that this term should be construed under 35 U.S.C. § 112, ¶ 6, despite the term “means” not appearing in the phrase. (ECF No. 47, at 19–20.) There is a strong presumption against means-plus-function claim construction when the term “means” is not used. *See Apple*, 757 F.3d at 1297 (“We have repeatedly characterized this presumption as strong and not readily overcome and, as such, have seldom held that a limitation without recitation of means

1 is a means-plus-function limitation.”) (quotations and citations omitted). This
2 presumption is only overcome if the claim fails to recite “sufficiently definite
3 structure” or merely recites a “function without reciting sufficient structure for
4 performing that function.” *Id.* (quoting *Linear Tech. Corp., v. Impala Linear Corp.*,
5 379 F.3d 1311, 1319 (Fed Cir. 2004)). Apple has failed to rebut this presumption.

6 The Court finds that the term “processing system” has sufficient structure to a
7 person of ordinary skill in the art. The language in claim 1 recites: “said computer
8 equipment comprising a processing system having at least one hardware resource with
9 a backup/recovery module.” ’835 Patent at 8:63–65. Claim 1 does not reference
10 processing system in only functional terms, but rather in structural terms as a portion
11 of a computer equipment with a hardware resource. The preferred embodiment
12 described in Figure 1 of the ’835 Patent further supports that processing system has
13 definite structure. The processing system 10 is composed of a processing unit 12,
14 input/output device 16, storage device 14, and hard disk drive 18. *See* ’835 Patent at
15 4:65–5:10. Therefore, the structure found in claim 1 can be imputed to “processing
16 system” in claim 9. *See Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed.
17 Cir. 2001) (“[A] claim term should be construed consistently with its appearance in
18 other places in the same claim or in other claims of the same patent.”).

19 Alternatively, Farstone argues that no construction of “processing system” is
20 required because the term exists in the preamble of claim 9 and the preamble is not
21 limiting. The Court disagrees and finds that the preamble in claim 9 limits the scope
22 of the claim. “Whether to treat a preamble as a limitation is a determination resolved
23 only on review of the entire patent to gain an understanding of what the inventors
24 actually invented and intended to encompass by the claim.” *Catalina Mktg. Int’l, Inc.*
25 *v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002) (internal citations
26 omitted). In this case the preamble is limiting because it “recites essential structure
27 that is important to the invention or necessary to give meaning to the claim.” *Bicon,*
28 *Inc. v. Straumann Co.*, 441 F.3d 945, 952 (Fed. Cir. 2006). Additionally, the body of

1 the claim derives an antecedent basis from the preamble for at least the terms
2 “recovery unit” and “processing system.” *See id.* (“Moreover, when the limitations in
3 the body of the claim rely upon and derive antecedent basis from the preamble, then
4 the preamble may act as a necessary component of the claimed invention.”).
5 Therefore, the preamble further limits “processing system” by requiring it to create at
6 least one recovery unit.

7 Both Farstone and Apple have failed to provide the Court with any alternative
8 constructions for this term. Consequentially, the Court must now construe the term
9 “processing system” without the assistance of arguments from either party. The Court
10 construes “processing system” as “a portion of a computer equipment having at least
11 one hardware resource with backup/recovery module and creating at least one
12 recovery unit.” As mentioned earlier, the language in claim 1 and the specification
13 supports this construction. Claim 9 also recites: “A recovery method for providing a
14 user with an outcome of recovery operation beforehand, suitable for a computer
15 system including a processing system and a displaying system, said processing system
16 creating at least one recovery unit . . .” ’835 Patent at 9:40–44. Again, the preferred
17 embodiment described in Figure 1 is instructive:

18
19 The computer equipment having a prompt access function includes a
20 processing system 10 and a displaying system 20. The processing system
21 10 has at least one hardware resource for processing or operating, such as
22 a computer system, wherein a processing unit 12, a storage device 14,
23 and an I/O device 16 are included therein. The processing system 10 may
also include a CD-ROM drive, a printer or a soft disk drive.

24 *Id.* at 4:63–5:3. Thus, the claim language and specification support the Court’s
25 construction of “processing system” as “a portion of a computer equipment
26 having at least one hardware resource with backup/recovery module and
27 creating at least one recovery unit.”

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CLAIM TERM	FARSTONE'S CONSTRUCTION	APPLE'S CONSTRUCTION
8. "loading said selected recovery unit into said processing system"	No construction necessary Or If construed: Copying some or all of the selected recovery unit into memory in the processing system	Making the selected recovery unit available as a logical drive.

This language appears in claim 9. The Court agrees with Farstone that one of ordinary skill in the art would understand that this term means "copying some or all of the selected recovery unit into memory in the processing system." (ECF No. 43, at 22.) Specifically, the Court agrees that the term "loading" is a common term in computer technology meaning to copy a program or data into a computer's memory. *See, e.g., Merriam Webster's Collegiate Dictionary* (11th ed. 2003) ("to copy or transfer (as a program or data) into a computer's memory esp. from an external source (as a disk drive or the Internet)"; "to become loaded into a computer's memory"); *Dictionary of Computing* 213 (4th ed. 2002) ("to transfer a file or program from disk or tape to main memory."); *Microsoft Computer Dictionary* 315 (5th ed. 2002) ("To place information from storage into memory for processing, if it is data, or for execution, if it is program code."). The '835 patent uses "loading" in accordance with its conventional meaning. *See, e.g., '835 Patent* at Abstract; 1:36–37; 3:42–44; 5:48–53. (*See also* Kaliski Decl. ¶¶ 53–54.)

In a rare departure from its previous arguments, Apple provides a construction of "making the selected recovery unit available as a logical drive." This construction is not supported by the specification. The only reference to "logical drives" in the entire specification is in the discussion of the prior art. *See '835 Patent* at 1:27–31, 1:34–37, 1:47–40. This discussion distinguishes the prior art on the basis that it had to mount recovery points as logical drives and therefore was limited in the number of recovery points that could be accessed. In contrast, the patent explains that an objective of the invention is to provide "unlimited recovery points for prompt

checking.” *See, e.g.*, ’835 Patent at 2:14–17. Furthermore, a person of ordinary skill would know that there is no need to make a recovery unit “available as a logical drive” in order to load it into the processing system. (*See* Kaliski Decl. ¶ 55.) Therefore, the Court adopts Farstone’s construction.

CLAIM TERM	FARSTONE’S CONSTRUCTION	APPLE’S CONSTRUCTION
9. “displaying a status corresponding to said processing system which corresponds to said selected recovery unit”	No construction necessary Or If construed: Displaying the state or condition of the processing system that corresponds to the selected recovery unit.	Indefinite.

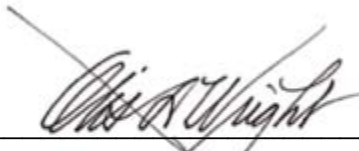
This language appears in claim 9. The basis of Apple’s contention is that the term “status” is indefinite. Having found otherwise above, the Court finds no other construction is necessary for this term.

V. CONCLUSION

For the foregoing reasons, the Court adopts the constructions set forth above. In light of this Claim Construction Order, the parties may file a Joint Proposed Post-*Markman* Scheduling Order re-setting the remaining dates and deadlines for this case for the Court to consider. The proposed order should be filed by no later than **March 13, 2015**. If no proposed order is filed, the original schedule (subject to any Court granted extensions) will remain in place.

IT IS SO ORDERED.

February 27, 2015



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE